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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-995

ROBERT THOMAS JENKINS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is reported at 470 F. 2d 1061.

JURISDICTION

The judgment of the court of appeals was entered on November 20, 1972. A timely petition for rehearing was denied on December 14, 1972 (Pet. App. 5a). The petition for a writ of certiorari was not filed until January 15, 1973, and is out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether under the circumstances of this case the trial court erred in not submitting an entrapment instruction to the jury.

2. Whether the finding of the district court that the government had made reasonable efforts to produce an informant as a witness at trial was clearly erroneous.

3. Whether the trial court properly refused to grant immunity to a potential defense witness.

4. Whether the trial court properly instructed the jury on the reasonable doubt standard.

5. Whether the trial court erred in refusing to admit into evidence the results of petitioner's polygraph test.

STATEMENT

Following a jury trial in the United States District Court for the District of Arizona, petitioner was convicted of conspiring to import marijuana, in violation of 21 U.S.C. 952(a), 960(a)(1) and 953 (Count 1) and of possessing marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) (Count IV). He received consecutive sentences of five years' imprisonment on Count I and two years' imprisonment on Count IV. The court of appeals affirmed (Pet. App. 1a-4a).

On June 22, 1971, petitioner, an attorney, made a telephone call from Winslow, Arizona, to one Johnnie McDaniel,[1] who had previously worked for petitioner in a lumber business and occasionally used his professional

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[1]Johnnie McDaniel ultimately pleaded guilty to Count I of the indictment (the conspiracy count), and later became the principal witness against petitioner at trial.

services (Tr. 265-266). Petitioner asked McDaniel if he wanted to make some money and suggested that he accompany petitioner on a trip to Mexico in order to meet some men who "dealt with him" (Tr. 266-268). On June 24, 1971, petitioner and McDaniel flew to Hermosillo, Mexico (Tr. 274). During the flight petitioner informed McDaniel that they were going to meet some people involved in smuggling narcotics and proposed that the two of them should split the profits from all transactions. Petitioner also promised to supply an airplane for McDaniel, a trained pilot, to be used to transport loads of marijuana from Hermosillo to Winslow (Tr. 275-276). On June 25, 1971, at a meeting in Hermosillo with George Bustamante—a Mexican customs official, sometime smuggler, and (unknown to petitioner) occasional informant for the United States government—it was agreed that Bustamante would provide a plane to be used in transporting a load of marijuana to Winslow (Tr. 276-282). The delivery was made as planned.

On August 21, 1971, after two additional loads of marijuana were smuggled into the United States pursuant to petitioner's plan, petitioner and McDaniel met with Bustamante and one Arnaldo Fontes in Hermosillo. McDaniel testified that he made this trip to Mexico because Bustamante had told him that otherwise he would "finish him off" or turn over incriminating photographs of him to the "Federales" (Tr. 617-618). Similar threats were made to McDaniel when he expressed reluctance to make one of the preceding trips (Tr. 298, 305-306). At the meeting in Hermosillo, Fontes gave petitioner the down payment for a newly purchased plane, which petitioner had purchased in Phoenix for his Mexican contacts. Petitioner paid Fontes for a new load of marijuana, then returned to Winslow (Tr. 369-378). McDaniel remained in Hermosillo until August 26, 1971 (Tr. 379-381).

He testified that during the period of August 22 through August 25 Bustamante threatened to kill him if he did not cooperate (Tr. 385-387). He also testified that before he left with the new load on August 26, Bustamante warned him not to land in Winslow since the authorities would be waiting for him there (Tr. 387-388). Ignoring this advice, McDaniel decided to fly the load to Winslow (Tr. 391-393). After finding petitioner, the two men drove to pick up the marijuana, which was dropped from the plane and was hidden behind some bushes (Tr. 392, 408-409). While they were loading the marijuana onto a truck, federal customs agents appeared and arrested them (Tr. 410-411, 708). Petitioner told the arresting officers "If you let me go, I can lead you to bigger fish" (Tr. 711). The marijuana recovered by federal agents at that time weighed 430 pounds (and was the basis for Count IV, the possession charge on which petitioner was convicted).

ARGUMENT

1. Petitioner contends that the trial court erred in refusing to submit to the jury an instruction on entrapment because of "creative activity" by the government. The district court, however, was not required to submit to the jury an entrapment instruction, either in its classic form or in accord with some formulation about "creative activity." The evidence at trial showing that petitioner was ready, willing and able to carry out smuggling operations was overwhelming (and petitioner does not argue to

the contrary).[2] The cases on which petitioner relies, as he acknowledges, stand for the proposition only that "the government may not obtain convictions *where its agents have urged defendants* to commit an offense and have *supplied materials necessary* to the commission of the offense regardless of whether there is criminal predisposition on the part of the defendant" (Pet. 9, emphasis added).

Here—even assuming that Bustamante can be considered a "government agent" for these purposes—it is not alleged that Bustamante had "urged" petitioner (as distinguished from McDaniel) to smuggle marijuana and, indeed, the evidence shows that it was petitioner who urged others to participate in the conspiracy. Nor is it alleged that the government was actually the source of the contraband. The record indicates that Bustamante was an occasional informant, rather than an undercover agent, and that here he first informed federal agents of the activities of petitioner's group only after the conspiracy had been planned, and after at least one or two substantive offenses

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[2]Petitioner thus does not claim that he was "entrapped" according to the doctrine of this Court that entrapment occurs when the government implants a criminal predisposition in the mind of the accused. *Sorrells* v. *United States*, 287 U.S. 435; *Sherman* v. *United States*, 356 U.S. 369. Moreover, at trial petitioner denied any involvement whatever in marijuana traffic (Tr. 951). The trial court's refusal to give the instruction was, therefore, proper in view of the rule that one who denies committing the offense may not plead entrapment. *United States* v. *Mehciz*, 437 F. 2d 145 (C.A. 9), certiorari denied, 402 U.S. 974; *Harris* v. *United States*, 400 F. 2d 264, 266 (C.A. 5); *Ware* v. *United States*, 259 F. 2d 442, 445 (C.A. 8); *United States* v. *Georgiou*, 333 F. 2d 440 (C.A. 7), certiorari denied, 379 U.S. 901; *United States* v. *Freeman*, 412 F. 2d 1181, 1183 (C.A. 10). Contra: *Hansford* v. *United States*, 303 F. 2d 219, 221 (C.A.D.C., *en banc*). Whether the defense is the traditional entrapment test or one based on "creative activity," as petitioner would have it, there is no rational basis to distinguish between the two defenses in regard to the permissibility of inconsistent pleadings.

had been committed.[3] The customs agent who was in contact with Bustamante testified that when he was first contacted by Bustamante he was told generally that petitioner and McDaniel were flying marijuana from Mexico into the United States. On approximately August 22, 1971, prior to the last shipment to which the substantive count at issue relates, Bustamante telephoned the undercover agent and told him that petitioner was in Hermosillo waiting for a load of marijuana (Tr. 32-36). On August 26, the day of the arrest, Bustamante informed the customs agent by telephone that McDaniel was flying a load and would land it on a dry lake bed just northwest of Winslow (Tr. 37). The agent testified further that he did nothing to "set up" petitioner or McDaniel or to provide the marijuana or make any arrangements whatever regarding smuggling activities in Mexico (Tr. 762-763). Bustamante merely provided him with information about the activities of petitioner and McDaniel (Tr. 764-765).

Although Bustamante did provide assistance in smuggling the marijuana into the United States, the law is settled that this kind of participation does not absolve knowing and willing participants, such as petitioner, from

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[3]Petitioner's criminal activities up to this point would justify his conviction for conspiracy (Count I), even under the new entrapment defense upon which he relies, regardless of the effect that the subsequent activities of the informant might have on the substantive count here (Count IV). See *United States* v. *McGrath*, 468 F.2d 1027, 1031 (C.A. 7), petition for certiorari pending (No. 72-761); *United States* v. *Chisum*, 312 F. Supp. 1307, 1312 (C.D. Calif.); cf. *United States* v. *Basey*, 468 F. 2d 194, 195-196 (C.A. 9), petition for certiorari pending (No. 72-786). But, since petitioner received a two year sentence on Count IV to run consecutively with the five year sentence he received on Count I, this is not a case where the concurrent sentence doctrine would be appropriate.

criminal responsibility. See *e.g., United States* v. *Milisci,* 465 F. 2d 700 (C.A. 5), certiorari denied, March 19, 1973 (Nos. 72-5865 and 72-5828); *United States* v. *Ortega,* C.A. 2, Nos. 72-1479, 72-1482, decided December 11, 1972, petitions for certiorari pending (Nos. 72-1098 and 72-1103). The case is thus plainly distinguishable from *United States* v. *Russell,* 459 F. 2d 671(C.A. 9), certiorari granted, 409 U.S. 911, argued February 27, 1973, cited by petitioner (Pet. 9), and *United States* v. *McGrath,* 468 F. 2d 1027 (C.A. 7), petition for certiorari pending (No. 72-761), which held that defendants could not be convicted for possession of contraband where the contraband (*McGrath*) or an ingredient essential to its production, and otherwise unobtainable (*Russell*), was supplied by an undercover agent or informant. Accordingly there is no reason to hold this case pending the determination of *Russell* and *McGrath.*

While the recent *per curiam* opinion of the court below in *United States* v. *Knight,* C.A. 9, No. 72-2031, decided October 16, 1972, pending on petition for certiorari (No. 72-965), would seem to go beyond prior cases, and suggest that activity falling short of actually supplying contraband may suffice to give rise to the "new" entrapment defense, here the same court concluded either that the direction and control exercised by law enforcement agents over Bustamante's activities was not as significant as the involvement with the informant in *Knight,*[4] or that in cases where the contraband, or an essential ingredient, does not originate with the government, it must be shown that the

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[4]In *United States* v. *Knight,* which was not cited below by either side or the court of appeals, a government informant acted as a conduit in a "controlled" delivery of heroin to the defendant from an illegal source. But, unlike Bustamante, the informant there acted under the direct control of law enforcement officers and, in fact, had turned the contraband over to them for marking and weighing prior to delivering it to the defendant.

defendant was "induced" to commit the crime by agents of the government. As the court of appeals stated (Pet. App. 2a):

> One who is not induced by government agents to participate in a crime may not rely upon the entrapment defense that might, in appropriate circumstances, be available to a colleague whose participation may have been induced by improper governmental activity. *United States* v. *Sanchez*, 440 F. 2d 649 (9th Cir. 1971). We express no opinion in this case upon the question whether an entrapment defense might have been available to McDaniel. That issue is not before us.

See, also, the earlier decision by the court below in *Greene* v. *United States*, 454 F. 2d 783, upon which petitioner principally relies (Pet. 10), which likewise involved both inducement and threats by an undercover agent.

The affirmance of the judgment of conviction was clearly correct. The decision below does not conflict with holdings of other courts of appeals and does not warrant review.[5]

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[5]Petitioner claims there is a conflict between the circuits on the question whether "creative activity" is a matter for the judge or jury to decide. Whether such a conflict exists is beside the point, since, as we have shown, this is not a case which comes within the ambit of the "new" entrapment defense. In any event, there is no conflict. *United States* v. *Bueno*, 447 F. 2d 903 (C.A. 5), cited by petitioner merely held that, in view of certain uncontradicted but limited testimony, entrapment was established as a matter of law, and therefore remanded the case for another jury trial to permit the government to produce countervailing evidence. Contrary to petitioner's assertions, *Greene* v. *United States*, *supra*, is perfectly consistent with this approach to the respective roles of the judge and jury. *Greene* held that the established facts showed excessive governmental activity as a matter of law. Moreover, both of these cases are in accord with the instant case, in which the court below held that the evidence at trial did not show that petitioner was entrapped, since the alleged improper activity by the informant was not with petitioner, but only with the pilot McDaniel (Pet. App. 2a).

2. Petitioner also argues that the government failed to make reasonable efforts to produce the informant Bustamante as a witness at trial (Pet. 11). As the court below noted, it is "not plausible that Bustamante's testimony could have helped [petitioner]" (Pet. App. 2a). Petitioner has yet to suggest how Bustamante's testimony could have aided his defense. Nor do the facts suggest that the government intentionally made Bustamante unavailable for trial. Indeed, the record discloses that the government made a reasonable effort to produce Bustamante. On January 4, 1972, the government informed the defense that Bustamante was the informant involved in the case. On January 28, 1972, the defense petitioned the district court for an order requiring that the government produce Bustamante at trial. On January 31, 1972, the government subpoenaed Bustamante and requested that the United States Marshal "use all efforts to see that this witness receives this subpoena" (R. 69-70).[6] At the end of January 1972, Ray Hatch, a United States customs agent, made phone calls to Bustamante's brother and to various Mexican customs agents in an effort to find Bustamante (Tr. 38-41). At the request of the government, Bustamante's name was placed in a computer system at the various border crossings between the United States and Mexico so that if Bustamante tried to enter the United States he would be held for trial (Tr. 44-47). As the district court observed, the government could not force Bustamante, a Mexican citizen, to appear (Tr. 70-71); and under the circumstances the trial judge "fail[ed] to see what else the Government [could] do with respect to Bustamante" (Tr. 69). The court below affirmed this finding (Pet. App. 2a) and it is certainly not "clearly erroneous."

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[6] "R." refers to the record of the clerk in one volume.

3. Petitioner claims that the trial court should have granted immunity to a potential defense witness, Lannie Witt (petitioner's distributor of marijuana) (Pet. 11-12). On the first day of trial the government had offered Witt immunity if he would discuss the case, but Witt refused (Tr. 787-789). During trial petitioner called Witt as a witness, but Witt's attorney advised him to invoke the Fifth Amendment and remain silent (Tr. 782-793). After counsel for petitioner asked the court to grant Witt immunity from prosecution so that he could testify for the defense, the court properly ruled that it had no power to grant immunity on its own motion. *Earl* v. *United States*, 361 F. 2d 531 (C.A. D.C.) (Burger, J.), certiorari denied, 388 U.S. 921; *Ellis* v. *United States*, 416 F. 2d 791 (C.A. D.C.). Petitioner relies on a footnote in *Earl, supra*, suggesting that the problem might be more difficult if the government granted immunity to its own witness while refusing to do so for a defense witness. 361 F. 2d at 534, n. 1. Petitioner argues that the instant case presents such a problem since McDaniel, a government witness, negotiated a plea bargain and thus had the equivalent of immunity. But the record does not indicate that the district judge participated in the plea bargain, or that McDaniel had a promise in advance of his plea that he would be placed on probation. In any event, as the court below stated, "The *Earl* case rejected the argument that a plea of guilty was the equivalent of a grant of immunity, and we agree " (Pet. App. 3a).

4. Petitioner contends that the trial court erred in instructing the jury on reasonable doubt (Pet. 12-13). The instructions, which were reread on request and explained in different terms, were clear and accurate (Tr. 1543-1544, 1587-1588). Petitioner made no objection to the instructions at trial (Tr. 1590-1591), as required by Rule 30, Fed.R.Crim.P., and the court of appeals properly

concluded not only that "alleged errors [were] far from plain," but that "the instructions as a whole fully and fairly explained to the jury the meaning of reasonable doubt" (Pet. App. 3a-4a).

Petitioner's claim here appears to relate principally to the portions of the instructions stating that "reasonable doubt * * * must be such as you would be willing to act upon in the most important and vital matters relating to your own affairs" (Tr. 1543-1566). Although this Court in *Holland* v. *United States*, 348 U.S. 121, indicated a preference for the "hesitate to act" test rather than the "willing to act" test, the phrase used here was not plain error when considered with the instructions as a whole. See *Holland, supra*, 348 U.S. at 140; *United States* v. *Acarino*, 408 F. 2d 512, 517 (C.A. 2); *United States* v. *Cole*, 453 F. 2d 902 (C.A. 8).[7]

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[7] Petitioner also claims that the jury's hopeless confusion was further demonstrated by a note sent to the court during deliberations stating that (Tr. 1593):

> A juror has offered to change his/her decision on one of the Counts, even though he/she has stated that he/she believes the opposite way.
>
> This was offered in exchange for an agreement of his/her decision on the other three Counts.

The court then reread certain instructions relating to the jury's duty to deliberate and consult one another (Tr. 1595-1597). Shortly thereafter, the court explained to the jurors that they were not being asked to "find someone guilty just to go home or to agree with other people," and that "each of you has to make up his own mind * * * and not surrender your conviction to the other eleven" (Tr. 1600-1601). (Petitioner did not object to this instruction.) The possibility of confusion was thus eliminated. Nor, as petitioner suggests, were there "inconsistent verdicts" indicating that confusion persisted. See *United States* v. *Manglona*, 414 F. 2d 642 (C.A. 9); *Dunn* v. *United States*, 284 U.S. 390, 394.

5. Petitioner also claims that the trial court improperly refused to admit into evidence the results of a polygraph test which petitioner offered to take in order to corroborate his plea of innocence (Pet. 9). The holding below is concededly in accord with the "unanimous" decisions of the courts of appeals on this issue (Pet. 13)[8] and does not warrant further review. Moreover, petitioner made no effort to establish by expert testimony the probative value of the polygraph tests. This alone would have warranted the denial of his application to admit such evidence. See *United States* v. *Wainwright*, 413 F. 2d 796 (C.A. 10), certiorari denied, 396 U.S. 1009.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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MARCH 1973.

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[8] See *e.g.*, *United States* v. *Salazar-Gaeta*, 447 F. 2d 468 (C.A. 9); *United States* v. *Sadrzadeh*, 440 F. 2d 389 (C.A. 9), certiorari denied, 404 U.S. 850; *United States* v. *Parman*, 461 F. 2d 1203 (C.A. D.C.); *Frye* v. *United States*, 293 Fed. 1013 (C.A. D.C.); *United States* v. *Tremont*, 351 F. 2d 144 (C.A. 6); *United States* v. *Rodgers*, 419 F. 2d 1315 (C.A. 10). A single district court decision, *United States* v. *Ridling*, 12 Crim. L. Rptr. 2055 (E.D. Mich.), is the only case petitioner is able to cite for a contrary view. *United States* v. *Zeiger*, 350 F. Supp. 685 (D.D.C.), cited by petitioner, was reversed by the United States Court of Appeals for the District of Columbia Circuit on November 9, 1972 (12 Crim. L. Rptr. 2135).